

1 IN THE UNITED STATES DISTRICT COURT
2 IN AND FOR THE DISTRICT OF DELAWARE

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4 ROBERT W. JACKSON, III, : CIVIL ACTION
5 :
6 Plaintiff, :
7 :
8 vs. :
9 :
10 CARL C. DANBERG, et al., :
11 :
12 Defendants. : NO. 06-300 (SLR)

11 - - -
12 Wilmington, Delaware
13 Wednesday, May 14, 2008
14 10:30 o'clock, a.m.

15 - - -
16 BEFORE: HONORABLE SUE L. ROBINSON, U.S.D.C.J.

17 APPEARANCES:

18 FEDERAL COMMUNITY DEFENDER OFFICE FOR
19 THE EASTERN DISTRICT OF PENNSYLVANIA
20 BY: MICHAEL WISEMAN, ESQ.,
21 HELEN MARINO, ESQ. and
22 MARIA K. PULZETTI, ESQ., ESQ.
23 (Philadelphia, Pennsylvania)

24 Counsel for Plaintiffs

25 Valerie J. Gunning
Official Court Reporter

1 APPEARANCES (Continued):

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3 OFFICE OF THE ATTORNEY GENERAL
4 BY: MARC P. NIEDZIELSKI, ESQ.,
5 GREGORY E. SMITH, ESQ. and
6 ELIZABETH ROBERTS MCFARLAN, ESQ.

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8 Counsel for Defendants

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13 (Proceedings commenced in the courtroom,
14 beginning at 10:30 a.m.)

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16 THE COURT: Good morning, counsel.

17 It does not appear to me as though this should
18 be a very long hearing, because from reading the Supreme
19 Court's opinion, it seems to me as though the only issue
20 before us is whether the State of Delaware has a protocol
21 that is either the same as Kentucky's or substantially
22 similar.

23 If there is some dispute about that, we will
24 need to have an evidentiary hearing. If the parties share
25 information and the plaintiff is satisfied, or plaintiffs

1 are satisfied that that test has been met, then this case
2 gets resolved.

3 So let hear from counsel for plaintiffs first.

4 MR. WISEMAN: Sure.

5 THE COURT: Do you disagree or have any other
6 thoughts?

7 MR. WISEMAN: Good morning, your Honor.

8 I guess, in a nutshell, we disagree that the
9 protocol and the recent history of the effectuation of the
10 protocol is substantially similar to the protocol in
11 Kentucky that was at issue in Baze.

12 I've got a list of differences. I don't know if
13 the Court wants to hear those now.

14 THE COURT: No. As I said, unless the State has
15 embraced exactly Kentucky's protocol, and unless you all can
16 agree, then I think we need to have a hearing, because I
17 don't think this can be resolved on the paper, and so, as I
18 said, we're just here to either schedule a hearing or to
19 have the State tell me that they have embraced Kentucky's
20 protocol.

21 MR. WISEMAN: Yes. Given those options, we
22 agree that a hearing is appropriate and required.

23 THE COURT: And did we reach the point before
24 the stay where all discovery has been done and we're ready
25 to proceed?

1 MR. WISEMAN: We would -- because there are
2 two new personnel, the warden and a deputy warden, new
3 since discovery ended, and the protocol itself has changed,
4 we would be asking to depose those two folks before a
5 hearing.

6 THE COURT: All right. And any notion as to how
7 long of a hearing this might be?

8 MR. WISEMAN: I believe we had talked about a
9 four-day hearing, and I think that's probably still about
10 right.

11 THE COURT: All right. Thank you very much.

12 MR. WISEMAN: Sure.

13 THE COURT: Let's hear from counsel for the
14 State.

15 MS. McFARLAN: Good morning, your Honor.

16 THE COURT: Good morning.

17 MS. McFARLAN: The State would agree with
18 your Honor's position as to what the issue is. We believe
19 that the Delaware protocol is substantially similar, almost
20 identical to that of Kentucky, and the defendants believe
21 that a motion for summary judgment would, in fact, be
22 appropriate. That in terms of factual disputes, there
23 really aren't any at this point. It is really a question of
24 interpretation of the standard in Baze and whether the
25 protocol as written is the same as Kentucky's.

1 THE COURT: It seems to me as though -- well, I
2 think the hearing has to be limited to the differences, and
3 if the test of whether it's substantially similar has to do
4 with whether the differences create a demonstrated risk of
5 pain, then I need expert witnesses. I don't want to read
6 affidavits. I want to see them. I want to hear them. I
7 want to ask questions, if I need to.

8 I don't think this is a case for summary
9 judgment, where you are just throwing paper at me. This is
10 a fact-specific life-and-death case. I'm not going to do it
11 on summary judgment.

12 MS. McFARLAN: All right, your Honor.

13 THE COURT: Now, I don't know what the
14 differences are yet. I think, before we go forward, I need
15 to get a better idea of what the differences are and what
16 the hearing is going to be focused on. So I think we need
17 to put up procedure where those are identified, the
18 witnesses that you all expect to call are identified. In
19 other words, you basically need a pretrial, prehearing
20 conference, so that we are all on the same page and we're
21 not ships crossing in the night.

22 MS. McFARLAN: Yes, your Honor.

23 As to the discovery, however, the protocol is
24 designed to have changing personnel, and there really --
25 given that the new warden has not been involved in any prior

1 executions, it does not seem productive that -- to have a
2 deposition. Had two years of litigation. Discovery,
3 they've had plenty of time. The current protocol has been
4 available and public for a lengthy period of time. You did
5 not halt discovery during this time period.

6 They had an opportunity to request depositions
7 at any time. They didn't. We think that discovery
8 is complete, and there really is no need for any
9 additional.

10 THE COURT: All right. And I guess I will ask
11 counsel for plaintiffs what purpose these depositions might
12 serve if these folks have never been involved.

13 I take it they weren't involved -- well, I'm not
14 sure it matters whether they were involved in developing the
15 protocol.

16 MS. McFARLAN: I mean, the protocol is designed
17 that even the ones that have been deposed certainly may not
18 be involved in future. But that is not the point of the
19 protocol. It is designed to have changing personnel.
20 People leave, people move, and it's not down to whether a
21 particular person is qualified. The question is whether the
22 protocol calls for a qualified person.

23 THE COURT: Right. Okay.

24 Let's hear from plaintiff's counsel as to why
25 these depositions, what purpose they serve.

1 MR. WISEMAN: Your Honor, it is our view, based
2 on prior depositions, that the protocol as written has
3 seldom been implemented in that way. There have been great
4 variations in the way it is written. While I would agree
5 with Ms. McFarlan that, in theory, a protocol could be
6 designed to apply to fungible people, the reality of the
7 past administration is that each person who has had to
8 administer it from differing positions, in other words, the
9 warden, the deputy warden, the I.V. team members, have all
10 had vastly different understandings of what is required by
11 the protocol.

12 THE COURT: Isn't that the purpose of this
13 hearing? I mean, it seems to me if I'm serving any purpose,
14 it's to determine whether the protocol as written passes
15 constitutional muster and then to impose on the State the
16 obligation to follow that protocol as written.

17 MR. WISEMAN: Well, I would make one addition to
18 that, your Honor. I think that Baze talks about not just as
19 written, but as applied, and so variations in the
20 application. For example, Baze makes a point --

21 THE COURT: But these people have not done
22 anything. I mean, these folks, apparently, have not been
23 involved, so what purpose does it serve to depose them?

24 MR. WISEMAN: I want to know what the warden's
25 understanding is of whether the light should be out. I want

1 to know what the warden's understanding is --

2 THE COURT: That's irrelevant, because it does
3 not matter what he understands now, quite frankly. He has
4 not done it and it only matters once the protocol has been
5 approved by the Court what he understands. I mean, I think
6 that's a ridiculous purpose that you want to depose these
7 folks, to say, this is what the protocol is. Are you going
8 to apply it this way?

9 MR. WISEMAN: No. No. No. If you were to lift
10 the stay at some point and they were to schedule an
11 execution and the warden walks in to the execution chamber
12 and has a vastly different understanding of how this thing
13 is supposed to work than the lawyers do, then I think that
14 that speaks to the question of whether there's a substantial
15 risk of unnecessary pain.

16 THE COURT: No. I disagree. I think it's a
17 waste of time to ask people, how are you going to apply the
18 standard that may or may not even be applicable by the time
19 this hearing is over. I mean, that's what you are asking
20 them.

21 MR. WISEMAN: I'm afraid I'm not being very
22 articulate.

23 Let's take an example. What role does the
24 doctor play in the execution process? We had the prior
25 warden say that the doctor was in charge of all medical

1 aspects of the procedure. The doctor said, I have no role
2 to play other than announce death. The current protocol is
3 silent on that. I think it's highly relevant what the
4 person is who is going to be in charge of carrying out the
5 protocol.

6 THE COURT: But that has nothing to do with the
7 warden. That has to do with whether the protocol passes
8 constitutional muster.

9 I mean, what you are saying is, if I don't
10 impose that specific safeguard, then we ought to know
11 whether the warden is going to impose it as a matter of his
12 own procedure.

13 MR. WISEMAN: Right. And I should be entitled
14 to discover what his answer is going to be to those
15 questions at the hearing. It as simple as that. If he get
16 up here and says, this is my understanding of the protocol,
17 why should I not be entitled to discover that answer before
18 the hearing?

19 THE COURT: I truly hate that word, entitled,
20 truly.

21 MR. WISEMAN: Entitled?

22 THE COURT: Entitled. I think there are very
23 few things we are entitled to in this world.

24 This is my problem. If these folks had -- these
25 people have not had the obligation yet to go through an

1 execution, so what you're asking them to do, as lay people,
2 is to take a protocol and to say, well, this is how I would
3 enforce it if the Court does not make any changes. And
4 that's what you are basically asking them to tell you; is
5 that correct?

6 MR. WISEMAN: Well, would I be permitted to ask
7 those question at the hearing, what is your understanding of
8 what this paragraph means? How are you going to carry this
9 out? If I'm -- excuse me -- if I'm permitted to ask those
10 questions --

11 THE COURT: A much better word.

12 MR. WISEMAN: Thank you.

13 If I'm permitted to ask those questions at the
14 hearing, then I should think I would be permitted to
15 discover what those answers are going to be.

16 This is -- you know, we're not talking about
17 months of discovery here. We're talking about two
18 depositions, which, you know, two days, at most.

19 THE COURT: Well, I'm trying to think through
20 as to what -- so you are saying that not only could it be
21 unconstitutional as written, that you could try to prove
22 that it would be unconstitutional as applied based on the
23 answers of two people who are new to the position and have
24 never had to apply this protocol?

25 MR. WISEMAN: Right. Because if the protocol is

1 vague in its terms, in material terms, it does not give
2 adequate guidance to the execution folks who are carrying it
3 out, that is a flaw. And if its terms are susceptible to
4 multiple meanings, one of which would constitute an Eighth
5 Amendment violation, that's relevant to whether the
6 defendant are going to carry out the execution in a
7 constitutional manner.

8 And under those circumstances, it would be
9 relevant to your determination as to what their
10 understanding is. Is it vague? Do you know what this
11 paragraph means, Warden? What are you going to do with this
12 paragraph?

13 THE COURT: All right. Let's hear from counsel
14 for the State. There is a point there.

15 MS. McFARLAN: Your Honor, if -- taking his
16 point, any time a warden changes, then, this Court would
17 need to readdress the issue of whether that warden
18 understood now what the protocol meant.

19 The idea is whether a general -- a person, a
20 reasonable person reading the protocol understands what it
21 means. Whether this particular warden -- we don't even know
22 if this warden will be there when there's the next
23 execution.

24 THE COURT: And how does one prove what a
25 reasonable person was? Through expert testimony? I mean,

1 I'm just asking. I'm trying to think about how this hearing
2 is going to go forward.

3 And if, for instance -- and, again, it hard for
4 me to know, because I don't know what the differences are
5 yet between Delaware's protocol and Kentucky's protocol.
6 But if the differences are omissions of fact, of detail, of
7 instructions, then I would think that unless you want me to
8 conclude, just per se conclude that those omissions make it
9 substantially dissimilar, that there's got to be some
10 testimony about how any reasonable person would infer these
11 safeguards.

12 MS. McFARLAN: Your Honor, we can certainly
13 explain that. The Delaware protocol is, in fact, more
14 detailed than the Kentucky protocol, and also, a minor
15 point, but the deputy warden has not changed and they've
16 already deposed him, so there would, in fact, only be one
17 deposition at issue.

18 But the protocol is very clear as written, and
19 I believe that once your Honor sees the protocols, that
20 you'll understand our position in that if it comes down to
21 someone's interpretation -- these are not -- it is very
22 clear, it's very straightforward. It is not something that
23 an expert would need to testify as to, and, in fact, really
24 don't see the point of a deposition.

25 THE COURT: All right. Counsel for plaintiff,

1 one last opportunity.

2 MR. WISEMAN: Yes. I think I can give your
3 Honor a very concrete example of the concern.

4 Kentucky's protocol requires the warden to do a
5 rudimentary consciousness check before allowing more painful
6 chemicals to be administered. Delaware's protocol does not
7 say that. Does the warden in Delaware, is he required to do
8 such a consciousness check or not? Who decides that? It's
9 not in the protocol. In that respect, it's significantly
10 less detailed than Kentucky's. I think we should be
11 permitted to ask a question about that.

12 THE COURT: Well, but --

13 MR. WISEMAN: Serious questions.

14 THE COURT: Again, if it's an omission, it seems
15 to me it would be the defendant who would -- well, it seems
16 to me that an omission is something that counts against the
17 defendant from the get-go, and it does not matter what this
18 warden would do. It's still an omission, and I understand
19 that different people might do it differently, and so it is
20 vague.

21 So, to me, it would not help you whether this
22 person said yes, I would do it, or no, I wouldn't, because
23 it does not matter. He might be on the job one week and
24 then someone else would come in with a different
25 interpretation.

1 So the omissions I think are already weighing in
2 favor of the plaintiff's point. I don't know how his
3 interpretation would sway me one way or another.

4 MR. WISEMAN: Well, I guess getting back to the
5 touchstone for discovery, would it lead to admissible
6 evidence? And I think that, depending on those answers, we
7 might want to elicit such testimony at the hearing. We
8 might choose not to. We may decide what your Honor just
9 said is absolutely on the mark and not want to present that
10 evidence, but --

11 THE COURT: But this is the thing. I think it
12 is very unfair, quite frankly, to put someone who is not a
13 lawyer and who has not had to go through the protocol -- I
14 don't know whether he has been trained in the protocol. I
15 don't know anything about that, to say, what would you do?
16 To me, that's just pure speculation, and it isn't admissible
17 evidence.

18 MR. WISEMAN: All right.

19 THE COURT: All right? All right.

20 So there's no further discovery. The question
21 is when we can schedule four days for this hearing, and I am
22 not sure when that is.

23 MS. McFARLAN: Your Honor --

24 THE COURT: Yes?

25 MS. McFARLAN: -- we don't really believe it

1 would take four days at this point. It comes down to the
2 legal question of the protocol, and, really, we're at a loss
3 as to what would take four days.

4 THE COURT: Well, you know what I think we
5 should do? I'm going to set aside some time today, but I
6 think that time may -- it's flexible, because I want to have
7 a pretrial where I understand exactly what the differences
8 are that we're going to be discussing and what witnesses are
9 going to be called, and at that point, I will do a final
10 schedule. But let me just find some time for you.

11 When might you all be prepared to go? I don't
12 know how many witnesses are involved or anything else. I
13 mean, sooner rather than later?

14 MS. McFARLAN: Your Honor, if you need the
15 expert witness live, that will take some scheduling. We did
16 not anticipate that and have not contacted them.

17 THE COURT: Okay. Then this is what we're going
18 to do. We're going to have a telephonic scheduling
19 conference. You all contact your witnesses, find out -- and
20 confer with each other and find some blocks of time when
21 everybody is available. We'll get together on the phone and
22 find out whether any of those blocks coincide with my
23 availability, and we'll also schedule, again, this little
24 pretrial conference, so that I know for sure that we're all
25 on the same page in terms of what we're doing.

1 MS. McFARLAN: Your Honor, would we be able to
2 have a teleconference with you at some point in limiting the
3 witnesses?

4 THE COURT: Well, I think that's what the
5 pretrial conference is for.

6 MS. McFARLAN: Okay.

7 THE COURT: Basically for us to decide what
8 we're really going to go forward on.

9 MS. McFARLAN: Okay. I'm just thinking in terms
10 of scheduling.

11 THE COURT: Yes. But I'm not going to schedule
12 that until I find out when the hearing is, although
13 actually it might make more sense for us to do that first,
14 because then, if there are witnesses that I decide really
15 are not appropriate, you don't have to worry about
16 scheduling them.

17 All right. So let's schedule that in the next
18 couple weeks.

19 Would you all be available on June 23rd, at
20 2:30?

21 MR. WISEMAN: That's fine with plaintiffs.

22 MS. McFARLAN: Yes, your Honor.

23 THE COURT: And I think what I would like before
24 then are written submissions, and I will -- by June 18th,
25 where you all basically -- if you could do it jointly,

1 that's fine. Otherwise, let me know what issues you think
2 we will be addressing at the hearing and what witnesses you
3 believe you will be presenting. You don't have to give me
4 documents or anything, but just issues and witnesses. And
5 then at that time, we'll figure out what kind of a hearing
6 this is really going to be and schedule -- well, and I guess
7 it would help to find out when your experts are available so
8 that we can go ahead and schedule them at that time.

9 So that is basically our mini pretrial
10 conference. And I think it probably should be in court, not
11 by telephone. All right?

12 And I will put out -- I will issue an order
13 to that effect so that we're all on the same page once
14 again.

15 All right. Is there anything else that we can
16 helpfully address this morning?

17 MR. WISEMAN: Not from us, your Honor. Thank
18 you.

19 MS. McFARLAN: No, thank you, your Honor.

20 THE COURT: All right. Thank you very much,
21 then, counsel. I have to close-out my computer, so you may
22 leave before I stand up.

23 (Court recessed at 10:52 a.m.)

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